

United States 1329

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of J. H. McNEICE and FRED McNEICE,
Individually and as Copartners, Doing Business
Under the Name and Style of McNEICE FURNI-
TURE CO., Bankrupts.

DOLPH BARNETT, as Trustee of J. H. McNEICE and
FRED McNEICE, Individually and as Copartners,
Doing Business as McNEICE FURNITURE COM-
PANY, Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Eastern District of Washington,
Southern Division.

FILED

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In the United States District Court for the Eastern
District of Washington, Southern Division.

No. 891.

In the Matter of J. H. McNEICE and FRED
McNEICE, Individually and as Copartners,
Doing Business Under the Name and Style of
McNEICE FURNITURE CO.,

Bankrupts.

Stipulation as to Record on Appeal.

IT IS HEREBY STIPULATED AND
AGREED by and between counsel herein that the
record on appeal shall constitute the following
papers and none other, and the clerk, in preparing
the record shall omit all captions, endorsements,
acceptances of service and verifications, except file-
marks:

1. Claim of O. A. Sproal.
2. Objections of Trustee to claim of O. A. Sproal.
3. Order of Referee.
4. Petition of review by Trustee.
5. Certificate of Referee.
6. Order of Judge Rudkin.
7. Opinion of Judge Rudkin.
8. Abstract of testimony as per copy attached.
9. Petition and order allowing appeal.
10. Assignments of error.
11. Citation.

Dated this 9th day of September 1922.

NELSON R. ANDERSON,
ROBERTS & ROBERTS,

Attorneys for Trustee.

GRADY, SHUMATE & VELIKANGI,

Attorneys for Claimant. [1*]

Claim of O. A. Sproal.

On December 30, 1919, the said bankrupts entered into a written lease with O. A. Sproal whereby they rented from him two storerooms located at 117 and 119 East A. Street and one storeroom located at 102 North 2d Street, the same being a part of the building owned by said Sproal; that the agreed rental was \$375.00 per month; that no rental has been paid for the months of June, July, August and September. The bankrupts occupied said building until some time in July, the exact date being unknown to deponent. When they made an assignment for the benefit of creditors and the assignee has since occupied said rooms, and still occupies them under the terms of the lease.

June rental\$ 375.00

July rental 375.00

August rental 375.00

September rental 375.00

TOTAL\$1500.00

[2]

COMBINATION PROOF.

[For Debt Due Corporation, Partnership, Individual—Secured or Unsecured]

In the District Court of the United States for the Eastern District of Washington.

IN BANKRUPTCY—No. —

In the Matter of MCNEICE FURNITURE COMPANY BANKRUPTCY, Bankrupt.

At Yakima, in the Eastern District of Washington, on the 10th day of September, A. D. 1921, came C. E. Fraser, of —, in the said District of —, and made oath and says that: (1)

(a) He is Treasurer (5) of the —, a corporation, incorporated by and under the laws of the State of —, and carrying on business at —, in the County of — and State of —, and that he is duly authorized to make this proof and says that the said — the person (firm or corporation) by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to said corporation,

(b) He is one of the firm of —, consisting of himself and —, of —, in the County of — and state of —; that the said — the person (firm or corporation) by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to this deponent's said firm,

(c) J. H. McNeice and Fred McNeice, copartners doing business as McNeice Furniture Company, the (firm) (against) whom a petition for the adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and true indebted to O. A. Sproal, for whom deponent, is agent.

In the sum of (2) Fifteen Hundred (\$1500.00) Dollars; that the consideration of the said debt is as follows: (3) Rental for June, July, August, and September 1921, at \$375.00 per month according to terms of written lease which is unexpired, more particularly set forth in the itemized account hereto annexed and made a part of this proof; that no part of said debt has been paid, except as shown by said account; that there are no setoffs or counter-claims to same except as shown by said account;

(4) That the said O. A. Sproal has not, nor has any person by his order, or to the knowledge and belief of said deponent for his use, had or received any manner of security (4) whatever, or any note (s) for such account; nor has any judgment been rendered thereon. (3)

And that the only securities held by said — for said debt are the following (listing and describing securities):

C. E. FRASER. (5)

Subscribed and sworn to before me this 10 day of September, 1921.

THOS. E. GRADY, (6)
Notary Public.

1. If creditor is corporation use paragraph "a"; if partnership use "b"; if individual use "c," striking out paragraphs not applicable.

2. Interest should be computed to date of filing petition if claim earns interest. If debt falls due at a later date and does not earn interest, then interest should be rebated to date of filing petition. See B. A. Sec. 63 (a) (b). If account consists of items maturing at different dates, the average due date should be stated, in default of which it shall not be necessary for Referee to compute interest. If open account it should state when debt became due. Each item should be dated and described. See Gen. Ord. 21.

3. If claim is founded on note or other instrument the same should be filed with proof of claim. If instrument be lost or destroyed statement of the fact should be filed under oath with claim. See B. A. Sec. 57 (b). If this form is used to prove a note, the words "or any note for such account" should be erased. If judgment has been rendered, it should be aptly described. The better plan is to file a certified transcript of judgment. If this form is used to prove judgment, the words "nor has any judgment been rendered thereon" should be stricken out.

4. If a debt is a secured claim, this paragraph should be stricken out, and the securities listed under the next paragraph. If claim is unsecured the next paragraph should be stricken out.

5. If claim is for debt due corporation, this proof must be made by Treasurer; if corporation has no Treasurer, by officer whose duties most nearly correspond to Treasurer. If debt is due partnership the signature here should be by party making affidavit, and not by firm name.

6. Signature and official capacity of officer. This may be acknowledged before a Referee, U. S. Commissioner, or Notary Public. [3]

Objections of Trustee to Claim of O. A. Sproal.

Comes now Dolph Barnett, as Trustee of the above-named bankrupts, by his attorneys, Roberts & Roberts and Nelson R. Anderson, and objects to the claim filed herein by O. A. Sproal, and respectfully shows the Court:

I.

That the above-named bankrupts on June 8th, 1921, made an assignment for the benefit of creditors to F. C. Hall; that the deed of assignment executed by said bankrupts dated June 8, 1921, conveyed all the stock and fixtures of the bankrupts located in that certain storeroom, corner of A and N Second Streets, Yakima, Washington, same being the premises for which O. A. Sproal has filed a claim for rent herein; that said F. C. Hall took possession of said stock and fixtures on June 20, 1921, and immediately removed said stock and fixtures out of the front part of said store and into the rear side room of said premises and on or about said 20th day of June, 1921, notified said landlord that the front part of said store and said premises were abandoned by said Assignee and that said landlord might re-enter and take possession of the front part of said storeroom. [4]

II.

That thereafter and on the — day of August, 1921, the undersigned, Dolph Barnett, was duly elected Trustee of the bankrupts herein and im-

mediately qualified and at all times since was and is duly elected, qualified and acting Trustee of the above named bankrupt estate.

III.

That said Trustee immediately took possession of the stock and fixtures of the bankrupts located in the rear of the aforesaid premises and at no time occupied the front part of said storeroom, that the said front part of said storeroom is the corner room of said premises and the most important and most valuable part of said premises, that the Trustee has at no time occupied the front part of said premises, that said landlord at all times has had possession and could have leased or rented the front part of said storeroom, that said landlord has at no time made demand upon said Assignee or said Trustee for the possession of the rear of said premises or at all, that said Trustee has occupied said premises as a storeroom and place of storage only, that the reasonable value of said premises occupied by said Assignee and said Trustee for the purpose of preserving and storing said stock and fixtures does not exceed the sum of \$50.00 per month; that the reasonable value of the rear of said premises occupied by the Trustee does not exceed the sum of \$100.00 per month for any purpose whatsoever.

IV.

That the assignee and Trustee herein occupied the rear of the aforesaid premises from June 20, 1921, until August —, 1921, [5] that the fair

and reasonable rental of said premises occupied by said Assignee and by said Trustee does not exceed the sum of \$50.00 per month as a place of storage and does not exceed the sum of \$100.00 per month for any purpose whatsoever, that the Court should fix and determine the reasonable rental value of said premises occupied by the Assignee and Trustee and should disallow any further compensation upon the claim filed by said landlord and refuse greater compensation to said landlord from the estate herein.

WHEREFORE, Trustee prays that a hearing be had upon claim filed by said O. A. Sproal, and upon the objections and this petition filed by the Trustee herein, that the Court fix and determine the reasonable rental value of said premises as a place of storage only and allow said claim at a rate not to exceed \$50.00 per month, without waiving the petition of the Trustee, that said rent be fixed on a storage basis only and in the event only that said petition be denied. Trustee prays the Court that it allow said landlord the reasonable rental value of said premises for any and all purposes to not exceeding the sum of \$100.00 per month from the date of said assignment to the date that said premises were reoccupied by said landlord and for such other and further relief as to the Court may seem proper.

DOLPH BARNETT,
Trustee. [6]

Order of Referee.

The above-entitled matter coming on regularly for hearing on the 9th day of December, 1921, upon the objections of the Trustee to the claim of O. A. Sproal, Dolph Barnett, Trustee, appearing in person and by his attorneys, Roberts & Roberts, and Nelson R. Anderson and the claimant, O. A. Sproal appearing by Grady, Shumate & Velikanje, his attorneys, and witnesses being sworn and evidence being submitted and the Court having heard argument of counsel and being fully advised in the premises—

IT IS NOW HERE ORDERED that the claim of the said claimant, O. A. Sproal, be allowed at the rate of \$375.00 per month from June 1st, 1921, to August 13th, 1921, the date of the entry of the Order of Adjudication of said bankrupts, amounting to \$907.45, which said amount is a preferred claim against said estate and at the rate of \$300.00 per month from August 13th to October 5th, 1921, amounting to \$518.39, which said amount is a part of the expenses of the Trustee in the administration of said estate; to which said ruling of the Referee the said Trustee duly excepted and his exception allowed.

Dated this 9th day of December, 1921.

R. B. MILROY,
Referee in Bankruptcy. [7]

**Petition for Review of Referee's Order Allowing
Claim of O. A. Sproal.**

To the Judges of the United States District Court
for the Eastern District of Washington:

Comes now Dolph Barnett, as Trustee of the
above-named bankrupts, and respectfully shows
the Court:

I.

That the Trustee herein filed objections to the
claim of O. A. Sproal filed herein, claiming an
indebtedness against both the estate and Trustee for
rent upon certain premises, on the ground that
said claimant was entitled to a reasonable rental
value on said premises, not exceeding \$100 per
month, from the date of the filing of the petitions
herein on June 21, 1921, until Oct. 1, 1921; that
a hearing was had before the Referee who has
made and entered an order allowing a rental of
\$375 to the date of the adjudication herein, namely,
on August 13, 1921, and at the rate of \$300 per
month from Aug. 13, to Oct. 5, 1921; that said
order was entered Dec. 9, 1921, to which the Trustee
duly excepted and his exception was allowed; The
Trustee feels himself aggrieved by said decision
and said order of the Referee, that said order is
erroneous, in this, that said claimant should have
been allowed rent as per lease to date of filing
petitions in bankruptcy and a rate not exceeding
\$100 per month from June 21, 1921, to Oct. 1, 1921;
that a review of said proceedings and said order

should be had before the United States District Judge herein. [8]

WHEREFORE, Trustee prays that said order be reviewed and reversed and that an order be entered sustaining the objections filed by the Trustee to the claim of said claimant Sproal.

NELSON R. ANDERSON,
ROBERTS & ROBERTS,

Attorneys for Trustee.

Filed Dec. 28, 1921. [9]

Certificate of Referee.

To the Honorable F. H. RUDKIN, Judge of said Court:

I, R. B. Milroy, one of the Referees in Bankruptcy of said Court, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceeding:

The Trustee filed written objections to the claim of O. A. Sproal, which claim was for rent of certain premises, occupied by the bankrupts, under a written lease, which premises were occupied also by the assignee of the bankrupts and by the Trustee after his appointment.

At a meeting of the creditors of said bankrupts duly called and held December 9, 1921, a hearing was had upon said objections and testimony taken thereon. The Referee made an order allowing the claimant rent at the rate of \$375 per month from

June 1, 1921, to August 13, 1921, and thereafter at the rate of \$300 per month, until the premises were vacated by the Trustee.

To which order the Trustee duly excepted and exception was allowed.

The Trustee has filed his petition for review and the question of the amount of rent of said premises is certified to the Judge for his opinion thereon.

That the testimony taken and the papers and files before the Referee in the matter of said question are transmitted herewith.

Dated this 3d day of January, 1922.

R. B. MILROY,
Referee in Bankruptcy. [10]

Order Modifying Order and Judgment of Referee.

The above-entitled cause coming on for hearing before the above-entitled court upon the appeal of the trustee in bankruptcy from the order of the Referee fixing the claim of O. A. Sproal for rent to be allowed from June 1st, 1921, to October 5th, 1921, and also fixing the fees for the attorney for the bankrupts, the Trustee appearing in person and by Roberts & Roberts and Nelson R. Anderson, his attorneys; the bankrupts appearing by C. E. Udell, their attorney, and O. A. Sproal. appearing by Grady, Shumate & Velikanje, his attorneys, and from a consideration of the record on appeal and argument of counsel it appearing to the Court that the claimant, O. A. Sproal, is entitled to a pre-

ferred claim for rental accruing under the terms of his lease and contract for a period of sixty (60) days immediately preceding the filing of the Petition in Bankruptcy at the rate prescribed in said lease and is entitled to a claim against the estate for rental at the rate of \$300.00 per month from the filing of the petition in bankruptcy until the premises covered by the lease were vacated by the trustees and that the same should be allowed and paid as a part of the expenses of administration of the bankrupt estate,—

IT IS NOW ORDERED BY THE COURT that the order and judgment of the referee be and the same is hereby modified as follows:

That the claim of the said O. A. Sproal for rent under the terms of his lease and contract be allowed and paid as a preferred claim from June 1st, 1921, to July 1st, 1921, at the [11] rate of \$375.00 per month, amounting to \$628.89, and that said claim be allowed and paid as a part of the expenses of the administration of said bankrupt estate from July 1st, 1921, to October 5th, 1921, at the rate of \$300 per month, amounting to \$750.00.

IT IS FURTHER ORDERED that the sum to be allowed to the attorneys for the bankrupts shall be \$150.00.

The trustee excepts to the foregoing ruling of the Court, and his exception is hereby allowed.

Dated this 8th day of April, 1922.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed in the United States District Court, Eastern District of Washington. April

10th, 1922. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy.

Memorandum.

C. E. UDELL, Attorney for the Bankrupts.

ROBERTS & ROBERTS and NELSON R. ANDERSON, Attorneys for Trustee.

GRADY, SHUMATE & VELIKANJE, Attorneys for O. A. Sproal.

RUDKIN, District Judge.

The involuntary petition was filed in this case on July 21, 1921, the order of adjudication followed on August 13, 1921, and the Trustee was elected or appointed on September 20, 1921. The Referee allowed rental on the premises occupied by the bankrupts under the terms of the written lease at the contract rate of \$375.00 per month from June 1, 1921, to the date of adjudication, amounting to \$907.45, and rental at a reasonable rate fixed at \$300.00 per month as expenses of administration from the date of adjudication until the surrender of the premises to the landlord on the 5th day of October, 1921, amounting to \$518.30. The Trustee objected to the allowance of the claim for rent under the terms of the contract after the date of the filing of the involuntary petition, and objected further to the amount of the allowance made for rental after that date as a part of the expenses of administration. Objection was also made to the allowance of attorney's fees to the bankrupts in the sum of \$200.00, and both orders are now before the Court on petition for review. [13]

Inasmuch as the claim for rent was a preferred one for a limited period under the statutes of the state, it would seem to matter little whether the rent is allowed under the terms of the written lease or on a *quantum meruit* basis, unless there is a substantial difference between the contract rate and the reasonable rental value, and inasmuch as the premises were rented for \$375.00 per month prior to the bankruptcy and for \$350.00 per month as soon as the landlord could gain possession after bankruptcy, there is manifestly but little difference between the contract rate and a reasonable rental. However, in my opinion the right to claim rent under the contract as such terminated upon the filing of the involuntary petition, and the Referee should have computed the rental from June 1, 1921, to July 21, 1921, under the terms of the contract at the rate of \$375.00 per month, and from the latter date until October 5th at the rate of \$300.00 per month. I find little merit in the claim that a part of the premises was surrendered by the Trustee, or in the claim that the amount fixed by the Referee as the reasonable rental value was excessive. I have no doubt that the cost of administration was more than it should have been, but this affords no reason why the owner of the premises should be deprived of his property.

There is little in the record to enable the Court to fix the amount of the attorney's fee to be allowed the bankrupts, but inasmuch as the attorney manifestly claimed as a part of his fee compensation for preparing a claim for exemptions and a peti-

tion for a discharge, the former of which cannot be taken into consideration, and the right to compensation for the latter is at least doubtful, I find that \$150.00 is a fair and just allowance and that no greater amount should be taxed against the estate.

The orders of the Referee will be modified accordingly [14]

Petition for Allowance of Appeal.

Dolph Barnett, as Trustee of J. H. McNeice and Fred McNeice, individually and as copartners, doing business as McNeice Furniture Company, Bankrupts, conceiving himself aggrieved by the judgment and order of the Court signed on the 8th day of April, 1922, and entered herein on the 10th day of April, 1922, in the above-entitled cause, for the reasons set out in his assignments of error filed herein, hereby appeals from said judgment and order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays this Honorable Court to grant him an order allowing an appeal from said judgment and said order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript of the record, proceeding and papers upon which decision and judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

NELSON R. ANDERSON,
ROBERTS & ROBERTS.

Attorneys for Dolph Barnett,
Trustee. [15]

Order Granting Appeal.

Dolph Barnett, as Trustee of bankrupts herein, having heretofore filed his petition for appeal and assignments of error, and having given notice to said claimant, O. A. Sproul, and the Court having duly considered the above and foregoing petition and being fully advised in the premises.—

IT IS ORDERED that the appeal prayed for be, and the same hereby is granted, and it is further ordered that a transcript of the record be transmitted by the Clerk of this Court to the Clerk of the Appellate Court.

Done in open Court this 6th day of Sept., 1922.

FRANK H. RUDKIN,

Judge. [16]

Assignments of Error.

Comes now Dolph Barnett, as Trustee of bankrupts herein, and assigns the following errors committed by the Court during the trial and in the rendition of the judgment and order entered in the above-entitled matter on the 8th day of April, 1922, allowing the claim of O. A. Sproul, upon which said Trustee will rely in the Appellate Court.

I.

The Court erred in approving the ruling of the Referee allowing the claim of O. A. Sproul as a preferred claim from June 1, 1921, to July 21, 1921, for the reason that said claim was not a lien or preferred claim from June 1, 1921, to July 21, 1921,

as allowed by the Court, said claim having been filed with the Referee on September 13, 1921, and could be a preferred claim only by virtue of Chapter 165, Session Laws of 1917, State of Washington, limiting in point of time a claim for rent entitled to priority as follows, "Such lien shall not be for more than two months rent due or becoming due, nor for any rent or any installment thereof which has been due for more than two months," [17] and hence said lien was of two months' duration next preceding the filing of said claim, namely, the two months preceding the filing of said claim on September 13, 1921.

II.

The Court erred in not entering an order allowing said claim as follows:

June 1, to July 10, 1921, at \$375.00	
per month, as a general claim	\$507.92
July 10, to July 21, 1921, claim entitled to priority120.97
July 21, to Oct. 1, 1921, expenses of Administration @ \$100.00	
per month 233.33
for the reasons stated in Assignment No. I.	

III.

The Court erred in allowing said claim at the rate of \$300.00 per month from July 21, 1921 (adjudication), to October 5, 1921 (surrender of premises), as a reasonable rental on *quantum meruit* as part of the expenses of administration, for the reason that an allowance of \$300.00 per month as a reasonable sum is not sustained by the evidence and is contrary

to the evidence, and in no event should any allowance have been made for October 1st to October 5th, as said claimant had executed a written lease on September 1, 1921, leasing said premises from October 1, 1921, for five years and had collected rent from October 1st to December 31, 1921.

IV.

The Court erred in not finding and in not allowing a charge for rent at a rate not exceeding \$100.00 per month as a reasonable rental on *quantum meruit* from July 21, 1921 (adjudication), to Oct. 1, 1921 (date landlord parted with leasehold), as part of the expenses of administration, [18] for the reason that the reasonable rental value of said premises during said time did not exceed \$100.00 per month as is shown by the evidence.

WHEREFORE said Trustee prays that said decision, judgment and order be reversed, and that said District Judge may be directed to enter a judgment and order allowing said claim as a general claim from June 1st to July 10, 192 ; as a preferred claim from July 10th to July 21, 1921; and the sum of \$100.00 per month from July 21 to October 1, 1921, as an expense of administration.

NELSON R. ANDERSON,
ROBERTS & ROBERTS.

Attorneys for Dolph Barnett,
Trustee. [19]

Citation (Copy).

The President of the United States to O. A. Sproul, and to Grady, Shumate & Velikanje, His Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office for the United States District Court for the Eastern District of Washington, Southern Division, in a cause where Dolph Barnett, as Trustee of McNeice Furniture Company, Bankrupt, is appellant, and you are appellee, then and there to show cause if any there be, why the judgment and decree mentioned in said appeal should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 6th day of Sept., 1922.

FRANK H. RUDKIN,
Judge. [20]

Abstract of Testimony.**Testimony of F. C. Hall, for the Trustee.**

F. C. HALL, a witness on behalf of the Trustee.

Direct Examination.

(Mr. ANDERSON.)

I was the assignee under an assignment for the benefit of creditors, executed July 8, 1921.

(Testimony of F. C. Hall.)

Mr. VELIKANJE.—Objection on ground of estoppel. They prevented us from voting on the Trustee and after Trustee is elected they turn around and try to oust our claim.

REFEREE.—They admit something due you here but the amount is not determinable. The amount of your preference had not been determined at that time and it was not gone into to determine at that time and I don't know as the Referee passed upon the question whether or not this claim should be voted on or not.

I took possession on July 20, 1921. The assets were all in the rear of the storeroom except some pianos and some rugs that were just over on the front part. I told the agent of the landlord within a day or two after I took possession, that we had no use for the front part of the storeroom. [21]

The rear of the store is 50 foot front by 75 feet deep, with an entrance to the rear of the store from A Street. The front part of the store faces on 2d Avenue and is 25x70 feet deep. The store is in the form of an L. The landlord made no demand on me to vacate the store but asked when I was going to vacate, and I told him that I could not tell just when the goods would be disposed of. I made an inventory of the assets.

Cross-examination.

(Mr. VELIKANJE.)

The front part of the store was already vacant with the exception of three or four pianos that stood in the back part of it and some rugs that hung up

(Testimony of F. C. Hall.)

on the rack. I removed these. To that extent the front part was partly occupied. There were three pianos that were taken out two or three weeks afterwards.

There is no partition between the two rooms. The rear store faces on A Street. The line made by the store facing on A Street is the line dividing the rear from the front room. The front end could not have been leased without a partition.

Redirect Examination.

(Mr. ANDERSON.)

There was room in the rear of the store for all merchandise and I told Mr. Fraser (agent for the landlord) I could take the goods out any time, that I didn't need the use of the front part; the front part facing on 2d Street is the more valuable part of the storeroom. [22]

Testimony of H. W. Bird, for the Trustee.

H. W. BIRD, a witness on behalf of Trustee.

I have lived in Yakima three years and have been engaged in the real estate business and am familiar with the rental value of the business property in the city, such as the storeroom occupied by the bankrupt. The fair market rental value of the premises occupied by the bankrupt during the months of July, August and September, 1921, if not tied up in any form of lease, would be \$100.00 per month.

(Testimony of H. W. Bird.)

The fair market rental value of the rear room under the same circumstances would be about \$50.00 per month.

Cross-examination.

I have not listed any real estate in that neighborhood and base my opinion on knowledge gained through buildings that we have had for sale and rents they have brought on 2d Street. I don't know what rental the Yakima Abstract Company pays now positively any rent paid in the neighborhood. The rental value depends on the value of the real estate, the investment, the demand. I understand the building was leased to Mr. McNeice at \$350.00 a month. I don't know what it is leased for now. The building is not built for storage purposes. I have general information of rental values over the city but I don't know the rent paid on the next door or two from the bankrupt's store. Rentals have gone up since last May, generally speaking.

Testimony of George Du Bourdien, for the Trustee.

GEO. DU BOURDIEN, a witness for Trustee, testified:

I have lived in Yakima for three years and am engaged in the real estate business and I am familiar with rental values on store buildings such as the bankrupt occupied. [23]

I have not done a whole lot of listing but I have done some, including one on 2d Street last month. The fair rental value of this store during July,

(Testimony of George Du Bourdien.)

August and September, 1921, for temporary purposes would be \$100.00 a month.

Cross-examination.

(By Mr. VELIKANJE.)

Q. "Now, if you had an opportunity to lease that at three hundred and fifty dollars a month, what would be the fair rental value in your opinion of that space?"

Objection. No proper basis laid for answer.

A. "I would do the natural thing and take all I could get for it. I would take \$350.00 in preference to \$100.00, of course."

Testimony of Dolph Barnett, in His Own Behalf.

DOLPH BARNETT, Trustee.

I am Trustee in the bankrupt estate, was elected August 13, and immediately took possession of the assets of the bankrupt which were in the back end of the Sproul building. There was some linoleum that slid over the edge into the front part of the store and a phonograph was just down on the partition—they were really not occupying the front.

The landlord, through his agent, told me he would like to have possession as quick as I could give it. I told him I could not give possession of the whole building at that time until I disposed of the goods. He did not demand that I move the stuff out. It was an inquiry of when I would get out; he wanted possession. His attitude was not that he was going to try to force me out. [24]

(Testimony of Dolph Barnett.)

I sold the assets on October 4th to Ira Lewis Brown who retailed the goods out down there during the next two weeks.

A man by the name of Simon moved considerable goods in the front part of the store shortly after I took possession. Mr. Fraser (agent for landlord) requested the keys and permission for Simon to move his goods in.

(Mr. FRASER.—It was about September 10th. I executed the lease with Simons on September 1st.)

Trustee further said that the inquiry as to when possession would be given was about September 1st. I let Mr. Simon move in about September 10th. I did not turn the keys over. Simon occupied the front part of the room from September 10th, on. After October 4th Brown sold out the rear end and Simon operated the front end of the store. The two operated the sale together. Simon had possession.

Cross-examination.

There is a step that goes up to the front room from the rear part of the building and the rugs and linoleum, and I think the phonograph, were just over the edge. The rugs were suspended from the ceiling. The rugs were in the front part of the store. Mr. Simon did not unpack his goods but brought them there in bulk in cases.

Mr. VELIKANJE.—Our answer is uncontroverted.

(Testimony of C. E. Fraser.)

Mr. ANDERSON.—It is not necessary to deny, but if there is any objection we want the record to show that it was denied. [25]

Testimony of C. E. Fraser, for the Claimant.

C. E. FRASER, a witness on behalf of claimant.

I am agent for O. A. Sproul, who owns the building formerly occupied by bankrupt.

Bankrupt made an assignment to Mr. Hall on July 8th. Bankrupt paid the rent to the first of June. I went to Mr. Hall as soon as he was appointed and asked him when we could get possession of the property. He said he could do nothing until the creditors had all gotten together and the goods had been sold. Mr. Hall at no time offered me a key to the building, he did tell me he had no use for the front part of it. I told him I didn't have any use for the front part unless we had all of it because we did not want to put in a partition; we did not want to rent that way, we wanted possession of the whole thing. He said he could not do anything until the court settled the matter and that is the way the whole thing was left and I think Mr. Hall will agree that I spoke to him several times while he was assignee. I had opportunity to lease the building to two or three different parties and wanted to lease the property. I asked \$350.00 a month upon a long term lease. I did not close a lease because I could not get possession or information when I could get possession, the matter was in Court. Adjudication was on August

(Testimony of C. E. Fraser.)

13th and the first meeting of creditors on September 13, 1921.

After Mr. Barnett was elected Trustee I asked him when we could get possession. I had already entered into a lease with Mr. Simon on a five year lease at \$350.00 a month, I expected to get possession the middle of September. [26]

Referring to the Simon lease, the witness said:

“That lease was entered into the first of September and I had planned on getting possession within five days after the trustee had been elected or Assignee had been settled on. The hearing was to be held on the 10th of September and I thought five days would be sufficient to sell the stock, but I made allowance for fifteen days more and dated the lease to commence October 1st to give Mr. Simon opportunity to get in there and fix up the store.”

The stock was sold to Brown, who took possession October 5th. Possession was surrendered to Brown and from him to Simon.

It is not practical to rent the front end of the store without the rear end unless a partition is put in. The property is too valuable to be used for storage purposes.

I spoke to the Trustee several times about getting possession, said he could do nothing until the stock had been sold. I told him and also Mr. Hall we would expect the Assignee or Trustee to stand the rent on the building while we were losing that money right along. I believe I could have rented

(Testimony of C. E. Fraser.)

it because I had three different inquiries besides Mr. Simon, that wished to lease the property but I could give them no information as to when I could give possession.

I have been in the rental business about four years. Rents have increased since June 1st.

Cross-examination.

Q. (Mr. ANDERSON.) Did anybody ever make any offer for the premises before Simon signed up a lease?

A. I could not say as to that they made me a different offer, I quoted the price and they were satisfied with the rental. [27] One firm had to take it up with their outside headquarters and before they finally made a decision I closed a deal with Mr. Simon at the same price I quoted them. There was a strong demand for the property on account of its location.

Simon paid no rent for the front part of the store in September. He had permission from the Trustee to unload the merchandise out of the three carloads shipped from Seattle, he had no place to put it.

“The front part of the store was vacant and he secured possession from the Trustee of the storage of his goods temporarily until he could get possession of the building, which was along in October.”

The lease to Simon is a five year lease at \$350.00 a month, payable monthly in advance, of which Mr. Simon has paid the first and last months' rent. It was executed September 1st, 1921, and commenced

(Testimony of C. E. Fraser.)

to rent from October. Mr. Simon has already paid his rent up to the first of January.

Redirect Examination.

The Continental Pipe Company has a room in the Sproul building next to the alley on A Street and pays \$100.00 a month rent. It is one third of the size of this other room. The Pacific Telephone & Telegraph Company have a room facing on 2d Street which they hold on a long term lease at \$125.00 per month. A grocerteria occupies the corner room on 2d Street next to an undertaking parlors, for which they pay \$100.00 a month on a long term lease. [28]

Filed Sep. 22, 1922.

Citation (Original).

The President of the United States to O. A. Sproul, and to Grady, Shumate & Velikanje, His Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office for the United States District Court for the Eastern District of Washington, Southern Division, in a cause where Dolph Barnett, as Trustee of McNeice Furniture Company, Bankrupt, is appellant, and you are appellee, then and there to show cause if any there be, why the judgment and decree mentioned in said appeal

should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 6th day of September, 1922.

FRANK H. RUDKIN,
Judge.

Filed Sep. 6, 1922. [29]

[Endorsed]: No. 3936. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of J. H. McNeice and Fred McNeice, Individually and as Copartners Doing Business Under the Name and Style of McNeice Furniture Co., Bankrupts. Dolph Barnett, as Trustee of J. H. McNeice and Fred McNeice, Individually and as Copartners, Doing Business as McNeice Furniture Company, Bankrupts, Appellant, vs. O. A. Sproal, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed October 26, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.